RE: KOH KIM KUAY;
EX PARTE: MBf FINANCE BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
DATO' V. C. GEORGE J
[BANKRUPTCY NO. D3-29-1698-91]
21 NOVEMBER 1994

BANKRUPTCY: *Application to strike out bankrupcty petition - Whether affidavit verifying the petition should be affirmed before or after the presentation to the petition - Consideration of s. 6(1) Bankruptcy Act 1967 and r. 106(1) Bankruptcy Rules 1969 - Whether there was a requirement that the copy of the petition attached to the verifying affidavit must be a sealed copy.*

This was an application by the respondent in a bankruptcy petition to have the petition struck out *in limine* on the ground that the affidavit verifying the petition should have been affirmed after the petition had been presented and not prior to that, relying on the decision in the case of *Sobri bin Arshad v. Ass. Tractor Sdn. Bhd.*

The respondent further contended that the petition was defective in that the copy of the petition attached to the verifying affidavit was not a sealed copy.

Held:

[1] The validity of a bankrupcty petition where the verifying affidavit is sworn prior to the filing of the petition has been considered in a number of cases locally and in England. It would seem that by at least 1933, it had come to be generally accepted in England as trite, that the affidavit verifying a bankrupcty petition had to be affirmed prior to the presentation of it to the Registry of the Court because in presenting the petition it had to be supported by the affidavit.

[2] Both on principle and on authority, it is clear that the Registrar must be satisfied that the petition had been verified before it would be received by him/her. It can therefore be safely said that it is beyond any argument that the verifying affidavit has accordingly to be affirmed prior to the presentation of the petition.

[3] Since the petition has to be verified before it is filed, it follows that the copy of the petition annexed to the verifying affidavit cannot be a sealed copy. *Ooi Thean Chuan v. Banque Nationale De Paris,* on which Counsel for the applicant purported to rely, does not say otherwise.

[Application to strike out bankruptcy petition dismissed with costs].

Cases referred to:
Sobri bin Arshad v. Ass. Tractor Sdn. Bhd. [1991] 1 CLJ 798 ***(not foll)***
Chin Yoon Timber Co. v. Overseas Timber Bhd. [1978] 2 MLJ 174 ***(refd)***
Ooi Thean Chuan v. Banque Nationale De Paris [1992] 2 CLJ 1225 ***(cons)***
*Re Mohd. Sharif bin Sapie ex parte Malayan Banking Bhd. [1992] 2 MLJ 102****(foll)***
In Ex parte Lindsay, In re Lindsay [1874] LR 52 ***(refd)***
Re a Debtor [1993] The Weekly Notes 87 ***(refd)***
Western Benefit Building Society [1864] Beav. 368 ***(refd)***
Re Shariff Hj. Sabari [1992] 3 CLJ 1755 ***(refd)***
Re Hong Weng Keong [1992] 3 CLJ 1744 ***(refd)***
Re Teoh Thean Peng [1993] 1 AMR 20 p. 831 ***(refd)***
In Re Lee Boon Hoi [1992] 1 AMR 45 p. 214 ***(refd)***
Re Foo Kee Yan (Penang High Court 29-329-90) ***(unreported)(refd)***

In Re Daunt [1905] 5 SR (NSW) 533 ***(refd)***
Loo Cheng Liang v. Ban Hin Lee Bank Bhd. [1992] 2 MLJ 519 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 6(1)
Bankruptcy Rules 1969, r. 106(1)
Companies (Winding-up) Rules 1972, r. 26

Other sources referred to:
Atkin's Court Forms on Bankruptcy & Insolvency, [1988] Issue, 2nd. Edn., Vol. 7, pp. 119, 120

For the judgment debtor - Hoe Gieok Hiok; M/s. Wong, Quek & Hoe
For the judgment creditor - Ranjit Singh (Tay Hong Huat with him); M/s. Cheang & Ariff

JUDGMENT

V.C George J:

This was an application by the respondent in a bankruptcy petition to have the petition struck out *in limine* relying on *Sobri bin Arshad v. Ass. Tractor Sdn. Bhd.* [1991] 1 CLJ 798 which judgment purported to follow *Chin Yoon Timber Co. v. Overseas Timber Bhd.* [1978] 2 MLJ 174 on the ground that the affidavit verifying the petition should have been affirmed after the petition had been presented and not prior to that as was the case here and as was the case in *Sobri bin Arshad* and on the further ground that the copy of the petition attached to the verifying affidavit was not a sealed copy (purporting to rely on *Ooi Thean Chuan v. Banque Nationale De Paris* [1992] 2 CLJ 1225).

In *Re Mohd. Sharif bin Sapie ex parte Malayan Banking Bhd.* [1992] 2 MLJ 102 I had pointed out at p. 104 that:

> It is s. 6(1) of the Act that provides that a creditor's petition shall be verified by affidavit. This provision is repeated in r. 106(1) of the Bankruptcy Rules 1969 ('the rules'). The equipollent r. 26 in the Companies (Winding-up) Rules 1972 provides that the affidavit verifying the petition for the winding up of a company `shall be sworn after and filed within four days after the petition is presented'. However, neither the said s. 6(1) of the Act nor the said r. 106(1) of the rules (nor any other provision in the said Act and in the said rules thereunder) prescribes when the affidavit verifying the bankruptcy petition is to be sworn and filed.

However, although the bankruptcy rules do not prescribe when the affidavit has to be sworn and filed, there are judgments of Superior Courts of jurisdictions having bankruptcy rules, in the context similar to our rules, that hold that the effect of the requirements of the rules is that a bankruptcy petition without a verifying affidavit shall not be received.

As early as 1874, *In Ex parte Lindsay, In re Lindsay* [1874] LR 52 Sir James Bacon CJ said at p. 54:

> The reason for requiring that affidavit to be made is, that it would not be right that the petition should be received by the Registrar without it; its only purpose is to justify the receiving of the petition and the sealing of a copy for serving, and it has nothing to do with the provision of s. 8 of the Act, that the Court at the hearing is to require proof of the act of bankruptcy alleged in the petition.

It would seem that by at least 1933, it had come to be generally accepted in England as trite, that the affidavit verifying a bankruptcy petition had to be affirmed prior to the presentation of it to the Registry of the Court because in presenting the petition it had to be supported by the affidavit. In *Re a Debtor* (p. 87 of The Weekly Notes of March 1933) in setting out the background to the case, it was noted that:

> On 8 November the petitioning creditor, as required by r. 151 of the Bankruptcy Rules, 1915, swore the usual affidavit verifying the statements in the petition exhibited, which was signed by the petitioner on the same day, namely, 8 November at which date the act of bankruptcy alleged in the petition to have been committed had not in fact been committed. On 10 November the petition and the affidavit were, as required by r. 154, brought before the Registrar for investigation, and he treated the statements in the petition as true statements, and sealed the petition, which together with the affidavit, which had been sworn on 8 November were accordingly filed, and copies of the petition were sealed for service.

In the course of his submissions Counsel there stated without challenge that:

> The sole object of the affidavit verifying the petition was to justify the receiving and sealing the petition and copies for service.

In *Western Benefit Building Society* [1864] Beav. 368 it was pointed out that in England, even in respect of a petition to wind up a company, prior to the inclusion in the rules of the provision that the affidavit verifying the petition shall be sworn after and filed within four days after the petition is presented, the practise was "to annex the affidavit to the petition and which therefore required it to be sworn before the filing of the petition."

Even in *Sobri bin Arshad* (*supra*) the learned Judge, Datuk Edgar Joseph Jr. J (as he then was), refers with approval at p. 798 of the report to such a holding in an old English case:

> It would appear that the validity of the creditor's petition depends on there being filed in Court an affidavit verifying the truth of the allegations therein. So, for example, the case of *Anon* [1861] 5 LT 527 is authority for the proposition that every petition for adjudication of bankruptcy must be accompanied with an affidavit verifying the allegations therein or it would not be received.

The judgment went on at p. 799 to find further support for that holding in *Atkin's Court Forms*:

> Furthermore, the Procedural Tables No. 6 of *Atkin's Court Forms on Bankruptcy and Insolvency* (2nd Edn. Vol. 7, [1988] Issue) Step No. 7 pp. 119, 120 reinforce that view.

However reliance was placed by Counsel moving this application on *Sobri bin Ahmad* because the learned Judge there had gone on to hold that because the verifying affidavit was sworn before the presentation of the petition the proceedings were flawed and that there was no valid petition before the Court.

Counsel for the applicant in urging me not to follow my own judgment *In Re Mohd. Sharif bin Sapie* went on to point out that in *Ooi Thean Chuan* (*supra*), Datuk Edgar Joseph Jr had gone on to analyse *In Re Mohd. Sharif bin Sapie* and had found flaws in it as well.

I have to pause to note that such an analysis and the finding made thereafter has to be regarded as *obiter* in that the only issue in *Re Mohd. Sharif bin Sapie* was not an issue in *Ooi Thean Chuan*. However the learned Judge thought it relevant to say at p. 1232 of *Ooi Thean Chuan*:

> I must next mention my decision in *Sobri bin Arshad v. Associated Tractors* [1991] 1 CLJ 798, where I had held that a creditor's petition was not valid because the affidavit verifying its contents had been affirmed before it was presented. In arriving at that conclusion however I did not treat the issues which arose for consideration with the same degree of elaboration as in the present case, a course which I have found necessary in view of a recent decision of V.C. George J in the as yet unreported case of *In re Mohd. Sharif bin Sapie, Ex Parte Malayan Banking* (Kuala Lumpur, High Court, (Commercial Division) Banking Petition No. 4763/90) wherein his Lordship embraced the opportunity of saying that he did not share my view in *Sobri's* case.

He then went on to point out what he considered to be omissions of "critical substance" in the approach taken by me in the *In Re Mohd. Sharif bin Sapie* judgment. He said:

> In my view, the learned Judge ought to have considered the following questions of critical substance:
>
> (1) whether s. 6(1) of the Bankruptcy Act, read with From II prescribed by r. 106 (1), requires the petition not only to accompany the verifying affidavit but also to be annexed to it upon presentation?
>
> (2) if so, whether due verification of the creditor's petition is a condition precedent to the issue of the creditor's petition having regard to the penal consequence of adjudication? and
>
> (3) if so, whether non-compliance with such condition precedent, sweeps away the jurisdiction of the Court to bring the alleged bankrupt before the Court and so cannot to condoned?

He went on to critically note:

> that the learned Judge has concentrated on the question whether affirming the affidavit before the creditor's petition is filed would affect the validity of the petition.

And he concluded:

> In my view he ought to have held that upon a proper construction of s. 6(1) ... it is a condition precedent that a bankruptcy petition would not only have to be accompanied by a verifying affidavit but also be annexed to it... In consequence, of not so holding, he appears to have placed undue stress on r. 26 which has nothing to do with bankruptcy proceedings ...

As has been seen, the validity of a bankruptcy petition where the verifying affidavit is sworn prior to the filing of the petition has been considered in a number of cases in England. Further, after *Sobri bin Arshad* and *In Re Mohd. Sharif bin Sapie*, there have been a number of local judgments in which the *ratio* similar to that in one or the other of those two judgments have been or in effect have been followed eg. Dato' Dr. Zakaria J (as he then was) in *Re Shariff Hj. Sabari* [1992] 3 CLJ 1755 that followed *Sobri bin Arshad*; Dato' Lamin J (as he then was) in *Re Hong Weng Keong* [1992] 3 CLJ 1744 that specifically declined to follow *Sobri bin Arshad*; *Re Teoh Thean Peng* [1993] 1 AMR 20 p. 831 where K.C. Vohrah J considered both *Sobri bin Arshad* and *In Re Mohd. Sharif bin Sapie* as well as almost all the reported local judgments on the point after those two judgments, and chose to, in effect, follow *In Re Mohd. Sharif bin Sapie* which is what in effect Shankar J (as he then was) also did *In Re Lee Boon Hoi* [1992] 1 AMR 45 p. 214; Dato' Mohd. Dzaiddin J (as he then was) in an unreported decision in *Re Foo Kee Yan* (Penang High Court 29-329-90) considered both *Sobri bin Arshad* and in *Re Mohd. Sharif bin Sapie* and chose to concur with the *ratio* in the latter judgment. Particularly because of the existence of the two conflicting views of our Courts of co-ordinate jurisdiction and in the face of the said specific critical analysis of my judgment in *In Re Mohd. Sharif bin Sapie* made in *Ooi Thean Chuan* on which Counsel relied, I have no choice but to give due consideration to what his Lordship had in *Ooi Thean Chuan* suggested I ought to have considered and following on that, what his Lordship thought I should have held *In Re Mohd. Sharif bin Sapie.*

However, in doing so, I found great difficulty in comprehending the first of those said 3 questions posed by his Lordship (or at least why it was posed) in the context of the facts and the issues in *In Re Mohd. Sharif bin Sapie* in that the question of whether the petition was annexed to the verifying affidavit had not been raised and in any event was not an issue in that case. Clearly there is no call for a Judge to give consideration to a question

not raised or posed in the matter before him. It was in fact common ground that the petition in *In Re Mohd. Sharif bin Sapie* was annexed to the verifying affidavit as can be seen from the introductory paragraph of the judgment that sets out the undisputed facts (commencing at p. 103 of the report):

> In these bankruptcy proceedings the petition was dated 5 March 1991 on which date it was signed on behalf of the petitioner by its Branch Manager Phong Ken Pin in the presence of an advocate and solicitor who duly attested the petition by signing it as witness. On the same day, 5 March 1991, the said Phong Ken Pin affirmed an affidavit verifying the petition. **The original copy of the petition was annexed to the verifying affidavit**. The petition and the said affidavit were filed in Court on 13 March 1991 on which date the required deposit of RM300 had been effected with the official assignee whose receipt for the same was, as is required, produced to the registry of the Court. (Emphasis is supplied).

Clearly in analysing *In Re Mohd. Sharif bin Sapie* the learned Judge was under the misconception that the petition was not annexed to the verifying affidavit and clearly the first of the three questions posed to me was based on that misconception. The other two questions which his Lordship thought I should have considered was said to be and is consequential to the first question and accordingly they do not call for any further comment. The learned Judge's view as to what I should have held has to be respectfully regarded as an erroneous view stemming from the said misconception.

As to the paragraph from the extract from his Lordship's judgment suggesting that my concentration in the case was misapplied, all I need say is that it is not surprising that I concentrated on the question "whether affirming the affidavit before the creditor's petition is filed would affect the validity of the petition" because that was the only issue for adjudication in the case!

It is interesting but somewhat confusing to note that his Lordship in dealing with my judgment in *Re Mohd. Sharif bin Sapie* goes on to appear to agree with my opinion saying:

> Doubtless, as the learned Judge puts it, "out of pragmatic necessity" the dating, signing, witnessing and attesting of a petition would have to take place before the petition is filed. Once these steps have been complied with the petition comes into being even though not yet filed. The contents of the petition would then have to be verified by affidavit in accordance with Form II prescribed by r. 106.

He however then veers back to repeat that there is the need to have the petition annexed to the affidavit (an aspect of the matter, as has been seen, not in issue in the judgment that he was analysing) and critically notes that I had placed undue stress on r. 26 of the winding up rules. What was overlooked by his Lordship was that in *In Re Mohd. Shariff bin Sapie* also, what was urged on me by Counsel was, that I should follow *Sobri bin Arshad* which although was in respect of a bankruptcy petition, unfortunately followed the ratio in *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* (*supra*) as can be seen at p. 799 of *Sobri bin Arshad* where the striking out of a winding up petition (for not meeting the requirements of r. 26) was cited with approval and applied:

> It is trite law that an affidavit must be made in some cause or matter pending in Court. An affidavit cannot support an "unborn petition" as a petition comes to life only when presented. In *Western Benefit Building Society* [1864] 33 Beav. 368; 55 ER 409, Sir John Romly MR decided that an affidavit sworn before the presentation of the petition "amounts to nothing". That case was followed in the local case of *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* [1978] 2 MLJ 173 where Syed Othman J (as he then was) struck out a winding-up petition because the affidavit was sworn before the presentation of the petition.

I therefore agree with the submissions of the Counsel for the judgment debtor that the flaw in the proceedings hereinbefore mentioned vitiates the creditor's petition and cannot be cured by the discretionary powers of the Court conferred by s. 133 of the Bankruptcy Act. Nor, for that matter, is it open to me to extend the time for filing as there is no valid petition before the Court. As was well put in the case of *Chin Yoon Timber Company* (*ibid*):

> The question of extension or abridgment to which this rule relates, does not arise. The affidavit cannot therefore be said to relate to any proceedings. Extending what the Master of the Rolls said in the *Re Western Benefit Building Society* you cannot verify to an unborn petition; a petition comes to life only when presented.

Now, the only issue for adjudication in *Sobri bin Arshad* was whether the bankruptcy petition which was dated 10 November 1989 was valid in the face of the fact that the verifying affidavit was affirmed on 9 November 1989 i.e., prior to the presentation of the petition. The references made in the judgment to the inability to verify to an unborn petition and that a petition only comes to life after it is presented and the express reliance placed on *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* cannot but be a reading by his Lordship into the bankruptcy rules of a non-existent rule equipollent to r. 26 of the winding up rules. It follows that in declining to follow *Sobri bin Arshad*, I had to be at some pains to point out that to be the position. The criticism of my doing so is I think, with respect, unmerited. What accordingly had to be done and was deliberately done was to stress the point that there is no rule in the bankruptcy rules equipollent to r. 26 of the winding up rules and to stress that the reliance on r. 26 in *Sobri bin Arshad* was erroneous and that accordingly I would decline to follow that judgment.

Apart from the learned Judge's said concession that he agreed with me that pragmatic necessity dictated that verification had to take place before the petition is filed, there is other material that suggests that the learned Judge had changed his views on the subject some time after *Sobri bin Arshad*.

In the year following *Sobri bin Arshad*, it was Datuk Edgar Joseph Jr. himself in giving the judgment of the High Court at Penang in *Ooi Thean Chuan* (*supra*) and in dealing with a question that arose in that case on the effect of the failure to annex the petition to the verifying affidavit, who referred to the Australian case *In Re Daunt* [1905] 5 SR (NSW) 533 to point out, with approval, at p. 1230 that:

> Walker J held that a petition was presented when is was filed and was not validly presented unless and until it has been filed together with a verifying affidavit.

Ooi Thean Chuan was delivered on 27 February 1992. On that same day his Lordship read his judgment in *Loo Cheng Liang v. Ban Hin Lee Bank Bhd.* [1992] 2 MLJ 519 where it is gratifying to note that he decided not to follow *Sobri bin Arshad* (although no reference was made to that judgment) and in effect chose to follow the *ratio* adopted in *In Re Mohd. Shafie bin Sapie*. He held at p. 523 of the report:

> Accordingly I am amply satisfied that an affidavit verifying a creditor's petition in the manner prescribed by the peremptory s. 6(1) of our Act read together with From II prescribed by r. 106 is a condition precedent to the issue of a creditor's petition. In the present case, upon the facts, there had been a clear breach of those provisions for, at the date of the issue of the creditor's petition, it was unverified by affidavit.

Accordingly, both on principle and on authority, it is my judgment that it is clear that the Registrar must be satisfied that the petition had been verified before it would be received by him/her. I think that it can be safely said that it is beyond any argument that it has accordingly to be affirmed prior to the presentation.

I hasten to add that in the light of the ratio of *Anon, Ex p Lindsay,* & *Re Daunt* referred to herebefore, what I had said in *Re Mohd. Sharif bin Sapie* at p. 106, that (I failed to see) "that anything turns on whether the affidavit is affirmed before or after the petition is presented so long as it is clear that it is the contents of the petition that are being verified" (which was said *obiter* because in fact the affidavit had been affirmed immediately before the petition was presented and it was annexed to the affidavit), has to be, to that extent, accepted as being an incorrect exposition of the law.

As to the second ground, that is that the copy of the petition annexed to the verifying affidavit has to be a sealed copy, clearly since the petition has to be verified before it is filed, it follows that the copy of the petition annexed to the verifying affidavit cannot be a sealed copy. *Ooi Thean Chuan* on which Counsel for the applicant purported to rely does not say otherwise.

The application had to be and was dismissed with costs.